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14

15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE DISTRICT OF MONTANA**
17 **MISSOULA DIVISION**

18 NATIVE ECOSYSTEMS COUNCIL, a non-
19 profit organization, ALLIANCE FOR THE
20 WILD ROCKIES, a non-profit organization,

21 Plaintiffs,

22 CV _____

23 FAYE KRUEGER, in her official capacity as
24 Regional Forester for the United States
25 FOREST SERVICE, an agency of
26 the U.S. Department of Agriculture, and
27 UNITED STATES FISH & WILDLIFE
28 SERVICE, an agency of the U.S. Department
of Interior,

Defendants.

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

I. INTRODUCTION

1. This is a civil action for judicial review under the Administrative Procedure Act and the citizen suit provision of the Endangered Species Act of the U.S. Forest Service’s Decision Memo approving the Millie Roadside Hazard Tree Removal Project (“Millie Project” or “Project”) and the U.S. Fish and Wildlife Service’s letter of concurrence for the same.

2. Plaintiffs Alliance for the Wild Rockies and Native Ecosystems Council (collectively “Alliance”) attest that the decision approving the Millie Project and letter of concurrence for the Project are arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with the law.

3. The Millie Project is a roadside hazardous tree removal Project along 15 miles of both currently open roads and roads open only to administrative use that will be opened for the timber removal. The Project is located on the Gallatin National Forest in grizzly bear habitat and within the Gallatin Bear Analysis Unit. It is also located in occupied Canada lynx habitat and lynx critical habitat.

4. The Forest Service initially included an additional 180 acres of salvage logging in the Project proposal; however, this portion of the Project is “tabled for now” because the “Forest does not have the capacity to carry out this work.”

1 5. Despite these facts, the Forest Service approved the Project as a categorical
2 exclusion from documentation and further NEPA analysis in an environmental
3 assessment or environmental impact statement.
4

5 6. Defendants' approval of the Project as written and analyzed is a violation of
6 the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 *et seq.*, the
7 Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, and the Administrative
8 Procedure Act (APA), 5 U.S.C. § 701 *et seq.*
9

10 7. Thus, Plaintiffs – two Montana conservation organizations dedicated to
11 protecting and restoring native wildlife habitat on the Gallatin National Forest and
12 ensuring the Forest Service complies with federal law – are compelled to bring this
13 civil action.
14

16 8. Plaintiffs request that the Court set aside the Decision Memo and/or letter of
17 concurrence approving the Project, pursuant to 5 U.S.C. § 706(2)(A) and 16 U.S.C.
18 § 1540(g), and that the Court enjoin the U.S. Forest Service from implementing the
19 Project until Defendants comply fully with NEPA, ESA and the APA.
20

22 9. Plaintiffs seek a declaratory judgment, injunctive relief, the award of costs of
23 suit, including attorney and expert witness fees, pursuant to the Equal Access to
24 Justice Act, 28 U.S.C. § 2412, and the citizen suit provision of the Endangered
25 Species Act, 16 U.S.C. § 1540(g)(4), and such other relief as this Court deems just
26 and proper.
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II. JURISDICTION

10. This action arises under the laws of the United States and involves the United States as a Defendant. Therefore, this Court has subject matter jurisdiction over the claims specified in this Complaint pursuant to 28 U.S.C. §§ 1331 (Federal Question) and 1346 (United States as Defendant).

11. An actual controversy exists between Plaintiffs and Defendants. Plaintiffs' members use and enjoy the Gallatin National Forest for hiking, fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, spiritual, and recreational activities. Plaintiffs' members intend to continue to enjoy and use the area frequently and on an ongoing basis in the future.

12. The aesthetic, recreational, scientific, spiritual, and educational interests of Plaintiffs' members have been and will be adversely affected and irreparably injured if Defendants implement the Project. These are actual, concrete injuries caused by Defendants' failure to comply with mandatory duties under NEPA, ESA, and the APA. The requested relief would redress these injuries and this Court has the authority to grant Plaintiffs' requested relief under 28 U.S.C. § 2201 (Declaratory Judgment) & 2202 (Injunctive Relief), 16 U.S.C. § 1540 (ESA) and 5 U.S.C. §§ 705 & 706 (APA).

13. Plaintiffs submitted written comments concerning the Project and fully participated in the available administrative review and appeals process, thus have

1 exhausted administrative remedies. Defendants' denials of Plaintiffs'
2 administrative appeals for the Project and Defendants' publication of the Decision
3 Memo were the final administrative actions of the U.S. Department of Agriculture
4 Forest Service. Thus, the challenged decision is final and subject to this Court's
5 review under APA, 5 U.S.C. §§ 702, 704, and 706.
6

7 14. All requirements for judicial review required by the ESA have been
8 satisfied, including the requirement of providing sixty days notice of intent to sue
9 prior to filing a civil action.
10

12 III. VENUE

13 15. Venue in this case is proper under 28 U.S.C. § 1391(e) and Local Rule 3.2.
14 Defendant Faye Krueger, the Regional Forester for the Northern Region of the
15 U.S. Forest Service, is the principal representative in this District of the U.S. Forest
16 Service and resides within the Missoula Division of the United States District
17 Court for the District of Montana. Also, the registered office of Plaintiff Alliance
18 for the Wild Rockies is located in Missoula, within the Missoula Division.
19

22 IV. PARTIES

23 16. Plaintiff ALLIANCE FOR THE WILD ROCKIES is a tax-exempt, non-
24 profit public interest organization dedicated to the protection and preservation of
25 the native biodiversity of the Northern Rockies Bioregion, its native plant, fish, and
26 animal life, and its naturally functioning ecosystems. Its registered office is
27
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1 located in Missoula, Montana. The Alliance has over 2,500 individual members,
2 many of which are located in Montana. Members of the Alliance work as fishing
3 guides, outfitters, and researchers who observe, enjoy and appreciate Montana's
4 native wildlife, water quality and terrestrial habitat quality, and expect to continue
5 to do so in the future, including in the Project area in the Gallatin National Forest.
6
7 Alliance's members' professional and recreational activities are directly affected
8 by Defendants' failure to perform their lawful duty to protect and conserve these
9 ecosystems by approving the challenged Project. Alliance brings this action on its
10 own behalf and on behalf of its adversely affected members.
11
12

13 17. Plaintiff NATIVE ECOSYSTEMS COUNCIL is a non-profit Montana
14 corporation with its principal place of business in Three Forks, Montana. Native
15 Ecosystems Council is dedicated to the conservation of natural resources on public
16 lands in the Northern Rockies. Its members use, and will continue to use, the
17 Gallatin National Forest for work and outdoor recreation of all kinds, including
18 fishing, hunting, hiking, horseback riding, and cross-country skiing. The Forest
19 Service's unlawful actions adversely affect Native Ecosystems Council's
20 organizational interests, as well as its members' use and enjoyment of the Gallatin
21 National Forest, including the Project area. Native Ecosystems Council brings this
22 action on its own behalf and on behalf of its adversely affected members.
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1 18. Defendant FAYE KRUEGER is the Regional Forester for the Northern
2 Region of the U.S. Forest Service, and in that capacity is charged with ultimate
3 responsibility for ensuring that each decision made at each National Forest in the
4 Northern Region, including the Gallatin National Forest, is consistent with
5 applicable laws, regulations, and official policies and procedures.
6

7 19. Defendant UNITED STATES FOREST SERVICE (Forest Service) is an
8 administrative agency within the U.S. Department of Agriculture, and is
9 responsible for the lawful management of our National Forests, including the
10 Gallatin National Forest.
11

12 20. Defendant UNITED STATES FISH & WILDLIFE SERVICE (USFWS) is
13 an administrative agency within the Department of Interior, and is responsible for
14 the lawful management of wildlife species listed under the ESA and critical habitat
15 designated pursuant to the ESA, including the grizzly bear, the Canada lynx and
16 lynx critical habitat.
17

18 **V. PROCEDURAL BACKGROUND**
19

20 21. On December 3, 2012, the District Ranger for the Gallatin National Forest
21 issued a Project Initiation letter for the Millie Project, proposing 258 acres of
22 roadside salvage logging, 180 acres of timber/non-roadside salvage and the
23 creation of .5miles of temporary road.
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1 22. On January 16, 2013, Gallatin National Forest issued a scoping notice for
2 the Project.

3 23. On January 20, 2013, the Gallatin National Forest published legal notice in
4 the Bozeman Daily Chronicle, announcing a 30 day comment period for the Millie
5 Project.

6 24. On January 31, 2013, the Forest Service issued a Biological Assessment for
7 Terrestrial Wildlife Species for the Millie Fire Roadside Hazard Tree Removal and
8 the Timber Salvage Units.

9 25. On February 15, 2013, Plaintiffs Native Ecosystems Council and Alliance
10 for the Wild Rockies submitted written comments on the Millie Project.

11 26. On February 26, 2013, the Forest Service generated a Note to the
12 Interdisciplinary Team and the Project file, stating the 180 acres of salvage logging
13 is “tabled for now” because the “Forest does not have the capacity to carry out this
14 work.”

15 27. On February 28, 2013, the U.S. Fish and Wildlife Service issued a letter of
16 concurrence, concurring with the Forest Service’s determination that the proposed
17 action is not likely to adversely affect grizzly bear, Canada lynx or designated lynx
18 critical habitat and, therefore, formal consultation is not required.

19 28. On April 17, 2013, District Ranger Lisa Stoeffler signed a Decision Memo
20 approving the Millie Project. The stated purpose of the project is “to provide for
21

1 the safety of road users and maintenance of the roads within the Millie fire
2 perimeter.” The Decision Memo does not mention or analyze the additional 180
3 acres of timber/non-roadside salvage.
4

5 29. On April 19, 2013, the Forest Service published legal notice of the Decision
6 in the Bozeman Daily Chronicle.
7

8 30. Plaintiff Native Ecosystems Council filed a timely appeal of the Decision on
9 or about May 27, 2013, and Plaintiff Alliance for the Wild Rockies filed a timely
10 appeal of the Decision on or about May 31, 2013.
11

12 31. On July 8, 2013, Forest Supervisor Mary Erickson denied Plaintiffs’ appeals
13 of the Millie Project.
14

15 VI. FACTUAL BACKGROUND

16 32. The Millie Fire Project area is located in the Storm Castle Creek drainage,
17 approximately 25 miles south of Bozeman, Montana in the Bozeman Ranger
18 District of the Gallatin National Forest.
19

20 33. The Gallatin National Forest is home to a number of threatened or proposed
21 species, and Forest Service sensitive species, including grizzly bear and Canada
22 lynx (Federally listed threatened species), wolverine (proposed for listing as a
23 threatened species), black-backed woodpecker, peregrine falcon, gray wolf, bald
24 eagle, flammulated owl, trumpeter swan, harlequin duck, western big-eared bat and
25 bighorn sheep (Forest Service sensitive species.
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28

1 34. The Millie Fire started from a lightning strike in September 2012 and grew
2 to approximately 10,600 acres, primarily in the Storm Castle Creek Drainage.
3 Most of the burn area experienced high-intensity, stand-replacing fire.
4

5 35. The area burned includes a road and trail system including the following
6 Forest System Roads: Storm Castle Road (FSR #132), French Creek Road (FSR
7 #2506), Lower Smith Creek Road (FSR #3126), Orchid Gulch Road (FSR #6985)
8 and FSR #6970.
9

10 36. According to the 2006 Gallatin Travel Plan decision, Storm Castle Road
11 (FSR #132) is managed for passenger car use, while FSR #3126 is managed for
12 project use, motorcycles and all-terrain vehicles (ATVs). FSR #6970 is managed
13 for back country road use, ATVs and motorcycles. Forest Service Roads #2506,
14 #2507 and # 6985 are administrative use roads, which mean that Forest Service
15 employees, permittees and other authorized users are allowed to use the roads for
16 management of National Forest System lands.
17

18 37. The Project decision proposes the removal of trees along approximately 15
19 miles of road within the Millie Fire perimeter.
20

21 38. The Forest Service explains that the road system is used to provide public
22 access to National Forest System lands and to provide administrative access for
23 management of these lands.
24

1 39. The Forest Service approved the Project as a categorical exclusion from
2 documentation in an environmental impact statement (EIS) or environmental
3 assessment (EA), under 36 C.F.R. 220.6 (d)(4) – Repair and maintenance of roads,
4 trails and landline boundaries.

5 40. The Project area is home to a number of threatened or endangered species
6 including the threatened grizzly bear and Canada lynx, as well as lynx critical
7 habitat.

8 Canada lynx

9 41. Canada lynx are listed as threatened under the ESA.

10 42. The Project is located within occupied Canada lynx habitat, and in Unit 5 –
11 Greater Yellowstone Area, critical habitat for lynx.

12 43. On the Gallatin National Forest, lynx habitat is generally defined by
13 Engelmann Spruce, subalpine fir, and moist Douglas-fir habitat types between
14 6,000 and 8,800 feet that produce boreal forest conditions of cool, moist,
15 coniferous forest in a variety of structural stages, as well as persistent, deep, fluffy
16 snow cover in winter.

17 44. Canada lynx require a range of differing age-class forests with a variety of
18 structural conditions to meet habitat requirements for reproductive denning,
19 foraging, resting and travel/dispersal.

1 45. The proposed treatment (roadside and units) is all located in the West
2 Gallatin Lynx Analysis Unit, which is considered the action area for the agencies'
3 lynx analysis.
4

5 46. In January 2000, the *Canada Lynx Conservation Assessment and Strategy*
6 (LCAS)(Ruediger et al. 2000) was published. It established early conservation
7 measures for lynx habitat.
8

9 47. In 2007, the *Northern Rockies Lynx Management Direction* (Lynx
10 Amendment) FEIS (USDA 2007) was published. This document drew on and
11 expanded the guidance found in the LCAS, and publication of the Lynx
12 Amendment Record of Decision amended the Gallatin Forest Plan to formally
13 incorporate management direction for the conservation of lynx.
14

15 48. The Lynx Amendment contains standards and guidelines specific to land
16 management activities.
17

18 49. The agencies' determination that the Millie Project will not adversely affect
19 lynx is based on its analysis and conclusion that the Millie Project meets the
20 following Lynx Amendment Standards: ALL S1; VEG S1; VEG S2; VEG G1.
21

22 50. Based on this analysis, the Forest Service determined the Project may affect
23 but is not likely to adversely affect Canada lynx or designated lynx critical habitat.
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1 Grizzly bear

2 51. The grizzly bear was listed as threatened under the ESA in the lower 48
3 states in 1975.
4

5 52. The Grizzly Bear Recovery Plan (USDI 1982, revised 1993) delineated
6 grizzly bear recovery zones in six ecosystems in the U.S., including the Greater
7 Yellowstone Area. The Greater Yellowstone Area grizzly bear recovery zone
8 covers parts of Montana, Idaho and Wyoming, and includes portions of six
9 national forests (including the Gallatin), two national parks, state and private lands,
10 and lands managed by the BLM.
11

12 53. Grizzly bears also frequently use areas outside the designated recovery zone.
13

14 54. On the Gallatin National Forest outside the recovery zone, approximately
15 43% of the area within the distribution zone for grizzly bears is designated
16 Wilderness, Wilderness Study Area, or is limited for motorized access.
17

18 55. The project is located outside the grizzly bear recovery zone, but within an
19 area where grizzly bears may be present.
20

21 56. The grizzly bear is known to be sensitive to the effects of access
22 management, especially related to motorized use, and grizzly bears tend to avoid
23 areas used by motorized vehicles.
24

25 57. “The higher the density of public motorized routes, the less likely a grizzly
26 bear is to use an area.”
27

VII. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

The agencies' failure to reinitiate consultation for the Gallatin National Forest Plan regarding the impacts on lynx critical habitat violates section 7 of the ESA

58. Plaintiffs incorporate by reference all preceding paragraphs.

59. The Northern Rockies Lynx Management Direction (“Lynx Amendment”)

was adopted as a Forest Plan amendment to all Region 1 National Forests,

including the Gallatin National Forest.

60. At the time the Lynx Amendment was adopted, there was no lynx critical habitat designated on any National Forest. Thus, the Lynx Amendment ESA consultation did not address whether the Lynx Amendment would adversely modify lynx critical habitat on the National Forests.

61. As decided in *Salix v. U.S. Forest Service*, -- F.Supp. 2d --, 2013 WL 2099811 (D. Mont. 2013), to comply with the ESA, the agencies must reinitiate formal consultation on the Gallatin National Forest Plan to determine whether the Lynx Amendment will adversely affect the lynx critical habitat that is now designated on the Gallatin National Forest.

62. Failure to reinitiate consultation on the Lynx Amendment violates section 7 of the ESA.

SECOND CLAIM FOR RELIEF

The Forest Service and U.S. Fish and Wildlife Service violate section 9 of the ESA because the Project allows unpermitted “take” of grizzly bears.

63. Plaintiffs incorporate by reference all preceding paragraphs.

64. Section 9 of the ESA provides that no person may “take” a listed species, including the threatened grizzly bear. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.40(b); *see also* 16 U.S.C. § 1533(d).

65. Species listed under the ESA receive near-absolute legal protection against taking. “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such contact.” 16 U.S.C. § 1532(19).

66. If an agency action is likely to cause take of a listed species, the USFWS may issue an incidental take statement that sets forth the predicted impact to the species, reasonable and prudent measures required to minimize take, and terms and conditions required to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

67. The action agency then must comply with the terms and conditions of the incidental take statement to be exempted from the ESA's take prohibition. 16 U.S.C. § 1536(o)(2).

68. The ESA applies to grizzly bears whether they are located within the Recovery Zone or outside the Recovery Zone. *Alliance for the Wild Rockies v.*

1 *Bradford*, 720 F.Supp.2d 1193, 1209 (D. Mont. 2010)(“[e]ven though bears may
2 be outside the recovery zone, the protections of the ESA, including take
3 prohibition, still apply.”)
4

5 69. On the Gallatin National Forest, grizzly bears may occur in the area of the
6 forest south of Interstate 90 but outside of the recovery zone.
7

8 70. The 2006 Gallatin National Forest Travel Management Plan biological
9 opinion and incidental take statement address management for grizzly bears
10 outside the recovery zone.
11

12 71. For areas outside the recovery zone, the 2006 Travel Plan incidental take
13 statement used “secure habitat” as a surrogate measure of take.
14

15 72. With this approach, the agencies use the amount of secure habitat in an area
16 to predict or measure take, and more secure habitat means less take.
17

18 73. The Service defines “secure habitat” as an area at least 10 acres in size and
19 more than 500 meters from an open or gated motorized access route or recurring
20 helicopter flight line.
21

22 74. The Conservation Strategy for Grizzly Bear in the Yellowstone Ecosystem
23 (ICST 2003) was developed by the Interagency Conservation Strategy Team and
24 completed in March 2003.
25

26 75. The Conservation Strategy requires that secure habitat be monitored outside
27 of the recovery zone.
28

1 76. According to the 2006 Travel Plan Biological Opinion, under the 2006
2 Travel Plan, secure habitat in the areas outside the recovery zone, south of I-90,
3 would increase; however, the Service maintained that incidental take will occur as
4 a result of the 2006 Travel Management Plan in some areas of the Forest, primarily
5 outside the recovery zone.
6

7 77. The proposed secure habitat percentages listed in the 2006 Travel Plan
8 Biological Opinion represents the surrogate measure of take for the area outside
9 the Recovery Zone.
10

11 78. To comply with the permitted take levels in the 2006 Travel Plan Biological
12 Opinion, the Service concluded that in the Gallatin Bear Analysis Unit, secure
13 habitat must be maintained at 57% to prevent jeopardy to the species.
14

15 79. In 2010, the Interagency Grizzly Bear Study Team indicated a baseline of
16 percent secure habitat for the Gallatin Bear Analysis Unit as 57.5%. The same
17 study indicated a *decrease* of percent core habitat of 4.4% from 2003 to 2010.
18

19 80. Thus, the Gallatin National Forest is not meeting its secure habitat
20 requirements of maintaining or increasing secure habitat outside the recovery zone,
21 and specifically violates the percent secure habitat requirement in the Gallatin Bear
22 Management Unit.
23

24 81. This results in unpermitted take of grizzly bears in violation of section 9 of
25 the ESA.
26

THIRD CLAIM FOR RELIEF

The Forest Service's determination that the Project "may affect but is not likely to affect" the threatened grizzly bear, and the USFWS's concurrence, violate section 7 of the ESA

82. Plaintiffs incorporate by reference all preceding paragraphs.

83. The Forest Service determined in its Biological Assessment for Terrestrial Wildlife Species that the Project “may affect, but is not likely to adversely affect” the grizzly bear, and the U.S. Fish and Wildlife Service concurred with the Forest Service’s determination.

84. The Project area, located in the Gallatin Bear Analysis Unit and outside the Recovery Zone, is in an area where the Forest Service is not complying with the secure habitat requirements in the 2006 Gallatin National Forest biological opinion, resulting in unpermitted take of grizzly bears.

85. The Forest Service claims the Project will have “no effect on secure habitat for grizzly bears” because road use will not increase above existing levels. However, the Project calls for the opening of 8 miles of currently restricted administrative roads to logging.

86. According to the 2006 Travel Plan Final Environmental Impact Statement, Road density standards for administrative roads are not the same as those for open roads and “[u]se of administrative roads is limited and should not be viewed the same as a road that is open to the public, and administrative roads are gated.”

1 87. Because secure habitat is a surrogate for take, the increase in road density
2 associated with this Project results in additional unpermitted take of grizzly bears.
3

4 88. Unpermitted “take” of grizzly bears is an adverse effect, so the Forest
5 Service must conduct formal consultation and the USFWS must prepare a
6 Biological Opinion.
7

8 89. Thus, the agencies’ determination that the Project “may affect, but is not
9 likely to affect” the threatened grizzly bear is arbitrary and capricious and in
10 violation of section 7 of the ESA.
11

12 **FOURTH CLAIM FOR RELIEF**
13

14 The Forest Service violated NEPA when it approved the Project as a categorical
exclusion despite the existence of extraordinary circumstances precluding a CE.
15

16 90. Plaintiffs incorporate all preceding paragraphs by reference.
17

18 91. The Forest Service violated NEPA when it approved the Project as a
19 categorical exclusion despite the presence of extraordinary circumstances
20 precluding the use of a categorical exclusion, including Canada lynx, grizzly bears,
21 and the Project’s location in lynx critical habitat.
22

23 92. “A proposed action may be categorically excluded from further analysis and
24 documentation in an EIS or EA only if the action falls within one of the established
25 categories and if there are no extraordinary circumstances related to the proposed
26 action.” See 36 C.F.R. § 220.6.
27

1 93. Resource conditions that should be considered in determining whether
2 extraordinary circumstances related to a proposed action warrant further analysis
3 and documentation in an EA or EIS include “(i) Federally listed threatened or
4 endangered species or designated critical habitat, species proposed for Federal
5 listing or proposed critical habitat, or Forest Service sensitive species” 36
6 C.F.R. § 220.6(b)(iii).
7

9 94. “The mere presence of one or more of these resource conditions does not
10 preclude the use of a categorical exclusion. It is the existence of a cause-effect
11 relationship between a proposed action and the potential effect on these resource
12 conditions, and if such a relationship exists, the degree of the potential effect of a
13 proposed action on these resource conditions that determines whether
14 extraordinary circumstances exist.”
15

16 95. The Ninth Circuit Court of Appeals has held that “[w]here there is
17 substantial evidence in the record that exceptions to the categorical exclusion may
18 apply, the agency must at the very least explain why the action does not fall within
19 one of the exceptions.” *California ex rel. Lockyer v. U.S. Dept. of Agriculture*, 575
20 F.3d 999 (9th Cir. 2009) (citing *California v. Norton*, 311 F.3d 1162, 1177 (9th Cir.
21 2002)). A “cursory statement” is insufficient. *Id.*
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1 96. The Project will adversely affect grizzly bears. The Forest Service also must
2 reinitiate consultation for the Gallatin National Forest Plan based on the Lynx
3 Amendment.
4

5 97. The cause and effect relationship and the degree of potential effect of the
6 Project on these resource conditions rises to the level of an extraordinary
7 circumstance in need of further analysis in an EA or EIS.
8

9 98. The Forest Service violated NEPA by failing to provide sufficient
10 explanation and support for the conclusion that no extraordinary circumstances
11 exist and erred in its conclusion that no extraordinary circumstances exist, in
12 violation of NEPA.
13

14 99. The Forest Service's violation of NEPA is "arbitrary, capricious, an abuse of
15 discretion, or otherwise not in accordance with law" and/or constitutes "agency
16 action unlawfully withheld or unreasonably delayed." 5 U.S.C. §§ 706 (2)(A), 706
17 (1).
18

19 **FIFTH CLAIM FOR RELIEF**
20

21 The Forest Service violated NEPA when it failed to take a "hard look" at the
22 potential direct, indirect and cumulative effects of the project on resources.
23

24 100. Plaintiffs incorporate by reference all preceding paragraphs.
25

26 101. NEPA requires that the Forest Service take a "hard look" at the potential
27 environmental consequences of a proposed agency action, including how the
28

1 Project may directly, indirectly and cumulatively impact native wildlife, including
2 lynx and grizzly bears and lynx critical habitat.

3 102. Direct effects are caused by the action(s) and occur at the same time and
4 place. Indirect effects are caused by the action(s) but occur later in time or are
5 farther removed in distance but are still reasonably foreseeable. Cumulative
6 effects are “the impacts on the environment which result from the incremental
7 impact of the action when added to other past, present, and reasonably foreseeable
8 future actions regardless of what agency or person undertakes such other actions.
9 Cumulative impacts can result from individually minor but collectively significant
10 actions taking place over a period of time.” 40 C.F.R. § 1508.7.

11 103. The Forest Service failed to adequately analyze the cumulative impacts of
12 the roadside hazard tree removal along with the 180 acres of salvage logging that
13 will occur at a later date in the Project area.

14 104. While the Biological Assessment provided analysis of the roadside hazard
15 tree removal and the 180 acres of salvage logging, the decision memo did not
16 analyze the impacts of the additional 180 acres of logging.

17 105. The Forest Service’s failure to adequately analyze the direct, indirect and
18 cumulative impacts of the Project on is “arbitrary, capricious, an abuse of
19 discretion, or otherwise not in accordance with law” and/or constitutes “agency
20

1 action unlawfully withheld or unreasonably delayed.” 5 U.S.C. §§ 706 (2)(A), 706
2 (1).

3 **VIII. REQUEST FOR RELIEF**

4
5 For all of the above-stated reasons, Plaintiffs respectfully request that this
6 Court:

7
8 A. Declare the Millie Project violates the law;
9
10 B. Enjoin implementation of the Millie Project
11
12 C. Award Plaintiffs their costs, expenses, expert witness fees, and
13 reasonable attorney fees under ESA and/or Equal Access to Justice
14 Act fee provisions as applicable; and
15
16 D. Grant Plaintiffs any such further relief as may be just, proper, and
17 equitable.

18
19 Respectfully submitted this 13th day of August, 2013.

20
21 */s/ Elizabeth W. Erickson*

22
23 Elizabeth W. Erickson

24
25 Timothy M. Bechtold

26
27
28 Attorneys for Plaintiffs